Supreme Court, U.S.
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No. 09-533

In the Supreme Court of the United States

CROPLIFE AMERICA, *et al.*,

Petitioners,

v.

BAYKEEPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

As the government agrees, the Sixth Circuit got it wrong when it invalidated the Final Rule at issue in this case on the remarkable ground that the Clean Water Act (CWA) *unambiguously* mandates National Pollutant Discharge Elimination System (NPDES) permitting for the use of pesticides in, over, or near waters. Gov't Resp. 9, 10-12. As the government observes, that ruling is directly at odds with "the Act's silence" on the question presented, the United States Environmental Protection Agency's (EPA) "longstanding practice"—since the enactment of the CWA—of *not* requiring permits for such discharges, and "FIFRA's specific regulation of pesticide use." *Id.* at 2, 11. And because the Sixth Circuit rested its decision on the first step of *Chevron*, the decision completely usurps the agency's authority to take a different regulatory approach to pesticide applications in, over, or near the waters of the United States—a category of discharges that is vitally important to the Nation's public health and agricultural economy. That profoundly misguided and extraordinarily disruptive decision warrants further review by this Court.

While agreeing that the decision is wrong, the government ultimately opposes certiorari based on a "Nothing to see here folks, just a *Chevron* violation!" approach. *See id.* at 9, 12-13. That response rings particularly hollow coming from the government. There is no more ardent or persistent institutional proponent of the importance of the *Chevron* doctrine than the Office of the Solicitor General. And in any event, this case does not involve a "mere" misapplication of *Chevron*. The Sixth Circuit's manifest disregard for *Chevron* and the fundamental

principles on which *Chevron* is grounded not only led it to categorically invalidate an executive regulation (itself a grave Judicial act), but to single-handedly mandate the largest expansion of the NPDES permitting program in the history of the CWA. Indeed, the government itself acknowledges that, if given effect, this ruling—which "make[s] the NPDES permitting regime applicable to *thousands* of pesticide applications that were not previously subject to CWA requirements"—will result in "significant disruption to both regulators and the regulated community." *Id.* at 15 (emphasis added). To say the least.

The government half-heartedly suggests that the extraordinary *two-year* stay entered by the Sixth Circuit—which itself underscores the magnitude of the decision below—will "reduce[]" the "significant disruption" and "adverse consequences" stemming from that decision and that the government "should" be able to develop a new "general" permitting regime to deal with the aftermath. *Id.* at 15-16. But, as explained below, EPA's permits would only cover *four* states; the other 46 states would have to devise their own solution. More fundamentally, as emphasized by the wide array of *amici* who have filed in support of certiorari, the administrative burdens and potential public health risks associated with a general permitting regime could have potentially grave consequences. The fact that the government *may* be able to somehow "reduce[]" (*id.* at 15) the serious adverse impact of the decision below by hurriedly erecting a new regulatory regime that was never envisioned (much less mandated) by Congress is no reason for this Court to deny review of the misguided decision that improperly and unwisely imposes that regime to begin with.

Finally, the government's passing suggestion (at 12) that the purported absence of a conflict provides a reason for denying review is unavailing. As petitioners have explained, the decision below *does* conflict with the decisions of this Court and other circuits. But, in any event, the decision below represents the final say on petitions for review challenging the Final Rule filed in *eleven* different circuits and consolidated by the Judicial Panel for Multidistrict Litigation before the Sixth Circuit in this case. This case therefore represents the whole ball game as far as the validity of that Rule is concerned. And the Sixth Circuit got it so wrong—at so much cost—that its decision invalidating the Rule practically cries out for this Court's review.

ARGUMENT

I. AS THE GOVERNMENT RECOGNIZES, THE SIXTH CIRCUIT'S DECISION IS UNTENABLE

Despite Baykeeper's vehement defense of the decision below, the Sixth Circuit's conclusion that the CWA *unambiguously* forecloses EPA's rule is—as the government recognizes (at 10)—simply untenable.

The Sixth Circuit erroneously concluded that the terms "chemical waste" and "biological materials" in CWA's definition of "pollutant" unambiguously encompass pesticides. *See* Pet.App.15a. In so finding, the court ignored numerous indicia of congressional intent, including: (1) the import of the only provision in the CWA that expressly refers to pesticides, *see* 33 U.S.C. §1254(*l*); Pet.App.77a-78a; (2) the significance of FIFRA—the statute designed to regulate the use of pesticides; (3) legislative history suggesting that pesticide residuals should be addressed through the

regulation of nonpoint sources rather than through NPDES, *see* Cong. Amicus Br. 7, and (4) the fact that Congress completed two major reauthorizations of the CWA without touching EPA's longstanding policy of excluding pesticide applications from NPDES permitting, *see* CropLife Pet. 26-27.

The Sixth Circuit's treatment of biological pesticides is particularly egregious. The Sixth Circuit found that Congress intended "to treat biological and chemical pesticides differently" and that the term "biological materials" *unambiguously* includes biological pesticides even when they do not leave excess or residuals in the water. Pet.App.15a, 18a-20a. That interpretation is at odds with the statutory text, conflicts with the Ninth Circuit's interpretation of the term, *see infra* p. 8, and—as the government observes (at 12)—leads to the "peculiar result" of regulating biological pesticides more heavily than chemical pesticides, even though EPA has determined "that biological pesticides generally pose less serious adverse environmental consequences than chemical pesticides."

The Sixth Circuit also erroneously concluded that the CWA *unambiguously* precludes EPA's interpretation that excess or residual pesticide is a nonpoint source pollutant since it becomes "chemical waste" at some point after discharge. As the government explains (at 11), the Sixth Circuit identifies *no* provision in the statute addressing the temporal issue. Rather, the Sixth Circuit reaches its conclusion by applying its own "but for" test, *see* Pet.App.24a, a test not supported in statute and exceeding anything applied by EPA or other courts.

At the same time, the Sixth Circuit's decision flies in the face of "longstanding [agency] practice." Gov't Resp. 2. In the about 40 years since Congress enacted the CWA, EPA has *never* required an NPDES permit for the application of pesticides to, over, or near waters, nor has it "ever stated in any general policy or guidance that an NPDES permit is required for such applications." Pet.App.29a.[1] The fact that the Sixth Circuit's decision mandates a stark departure from longstanding agency practice alone underscores the need for this Court's review. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974) (granting certiorari where appellate decision "was inconsistent with long-established [agency] policy").

It is true, as the government notes (at 12), that the Sixth Circuit "recited" the *Chevron* test. But the court went on to fundamentally *depart from* that test. In particular, in undertaking its *Chevron* step one analysis, the court disregarded the tools of statutory construction and implausibly concluded that the provisions at issue were capable of only *one* interpretation—its interpretation. The Sixth Circuit's decision does violence to *Chevron*—"an extremely important and frequently cited opinion," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in judgment)—and arrogates to the courts lawmaking power delegated to the agency. That fundamental departure from *Chevron* warrants review.

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[1] Baykeeper's claim (at 3, 27)—that this longstanding practice represents merely "'enforcement' discretion"—thus cannot withstand scrutiny.

Indeed, because the Sixth Circuit's decision holds that the CWA *unambiguously* resolves the important question presented, that decision now "trumps" any other agency construction and "leaves no room for agency discretion" in administering the statute in this critical sphere. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS

As noted, the absence of a direct conflict on the Final Rule's validity is a red herring because the decision below resolves petitions for review that were filed in *eleven* different circuits and consolidated for review before the Sixth Circuit.[2] In any event, the Sixth Circuit's decision *does* conflict with the decisions of this Court and other circuits in important respects.

That includes *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). While it is of course true that *Burlington Northern* does not directly address the precise question presented here, Gov't Resp. 13; Baykeeper Resp. 9-10, the Sixth Circuit's decision is nevertheless seriously at odds with the Court's analysis in *Burlington Northern* of analogous provisions of CERCLA. In particular, the Sixth Circuit in this case committed the same basic error as the Ninth Circuit in *Burlington Northern* by

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[2] While Baykeeper suggests (at 2) that industry petitioners chose the forum, the Judicial Panel for Multidistrict Litigation chose the Sixth Circuit through a random selection mandated by statute. *See* 28 U.S.C. §2112(a)(3).

glossing over the intent to dispose that is inherent in both the ordinary meaning of the term "waste" here, *see* Pet.App.15a-16a, and "arrange for disposal" in *Burlington Northern*, 129 S. Ct. at 1877, 1879.[3]

The Sixth Circuit's decision also conflicts with the Second Circuit's analysis of the term "solid waste" in the RCRA regulations at issue in *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 205 (2d Cir. 2009). *See id.* at 208 ("[M]aterials put to their ordinary, intended use are not 'abandoned' under the regulatory definition of solid waste ...."). The CWA's permitting program, CERCLA, and RCRA are all designed to regulate the intentional discharge or disposal of waste products. The mandate of these statutes contrasts with that of statutes designed to regulate harms from application of *useful* products, such as FIFRA, the Federal Food Drug and Cosmetic Act (FFDCA) and the Toxic Substances Control Act (TSCA). The Sixth Circuit's treatment of pesticides used in accordance with their FIFRA labels as "wastes" conflicts with this Court's opinion in *Burlington Northern* and the Second Circuit's analysis in *Metacon Gun Club*.

Furthermore, as the government acknowledges (at 12), the Sixth Circuit's decision conflicts with the

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[3] Nor does Baykeeper successfully distinguish this case. Baykeeper Resp. 9-10. *Burlington Northern* held that, "[i]n order to qualify as an arranger, Shell must have entered into the sale of D-D *with the intention that at least a portion of the product be disposed of* during the transfer process." *See* 129 S Ct. at 1880 (emphasis added). So too here, for a pesticide to be a waste, there must be an intention that at least a portion of the pesticide be disposed of.

Ninth Circuit's interpretation of the CWA's term "biological materials." *See Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002). In *Taylor Resources*, the Ninth Circuit concluded that the CWA definition of "pollutant" is *ambiguous* on whether the term "biological materials" includes all biological matter or is limited to waste, and held—"in accord with the views of other courts that have examined what constitutes 'biological materials' under the Act"—that "'biological materials' means the waste product of a human or industrial process." *Id.* at 1016-17. In contrast, the Sixth Circuit found the term "biological materials" *unambiguously* "cannot be read to exclude biological pesticides or their residuals," Pet.App.19a, even though biological pesticides are not waste.[4]

The Sixth Circuit decision also conflicts with this Court's decision in *Train v. Colorado Public Interest Research Group, Inc.*, in which the Court concluded that the term "radiological materials" in the CWA excluded source, byproduct and special nuclear materials regulated under the Atomic Energy Act noting the significance of the existing regulatory scheme. 426 U.S. 1, 23-25 (1976); *see also* CropLife Pet.

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[4] *Taylor Resources* demonstrates the flaw of Baykeeper's argument (at 6-8) that the Sixth Circuit's decision is "harmonious" with other federal appellate jurisprudence. Furthermore, as the government points out (at 4), neither *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001) nor *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) "contained a square holding interpreting the term 'pollutant' in a manner inconsistent with the EPA rule that is at issue in this case."

23-25 (discussing the significance of the FIFRA regulatory scheme). Like the Sixth Circuit here (Pet.App.14a-15a), the Tenth Circuit in *Train* found that the statutory definition at issue unambiguously included "all radioactive materials" because the reference to "radioactive materials" did not contain an express qualification or exception. 426 U.S. at 9. This Court disagreed. *Id.* at 9-10, 23-25.

III. THE POTENTIALLY DEVASTATING PRACTICAL CONSEQUENCES OF THE DECISION BELOW UNDERSCORE THE NEED FOR REVIEW

The government acknowledges (at 15) that the decision below will cause "significant disruption to both regulators and the regulated community," but suggests that certiorari is not warranted because the extraordinary two-year stay will "*reduce*[]" the potentially devastating impact of that decision. (emphasis added). That argument should be rejected.

To begin with, EPA only administers NPDES general permitting in *four states*.[5] Pet.App.118a. Thus, while EPA assures this Court that the stay will allow EPA to develop a new general permitting regime to cover the "thousands of pesticide applications" (Gov't Resp. 15) that now require permits, EPA cannot speak for the remaining *46 states* that administer

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[5] Those states are: Idaho, Massachusetts, New Hampshire, and New Mexico. EPA also administers permits in the District of Columbia and certain federal territories and lands. EPA, NPDES, *State and Tribal Program Authorization Status*, http://cfpub.epa.gov/npdes/statestribes/astatus.cfm (last visited Jan. 21, 2010).

NPDES general permitting and will be required to act as well. Moreover, as EPA has recognized, these States already face budgetary pressures and other constraints that challenge their NPDES programs. Pet.App.131a. Accordingly, even if EPA erects a new general permitting regime within two years, pesticide applicators in any one of the 46 authorized NPDES States may well find themselves without an available permit when the mandate issues.

Moreover, there is no guarantee that state or federal general permits will fully accommodate this important and widespread area of activity. The scope of activities swept into the NPDES permitting requirement by the decision below is breathtaking. Indeed, EPA estimates that even a narrow reading of the Sixth Circuit's decision will require NPDES permits for roughly 5.6 million pesticide applications per year by approximately 365,000 pesticide applicators. Pet.App.127a. For example, the Sixth Circuit's mandate will expand NPDES permitting to include: (1) pesticide applications by roughly 1,200 Mosquito Abatement Districts, Pet.App.135a; (2) pesticide applications by America's farmers, such as the application of herbicides to combat weeds in irrigation systems and agricultural drainage systems, which are critical to agricultural production, *see* Pet.App.126a-27a; and (3) numerous other activities, such as protecting forests from Gypsy moths, protecting the endangered Florida Manatee's habitat by controlling invasive plant species in waterways, and preventing pest infestation and overgrown vegetation from interfering with the use of Coast Guard navigational aids, Pet.App.157a-58a, 166a.

The NPDES permitting mandated by the Sixth Circuit will deprive these applicators of the flexibility that is crucial for most pesticide applications. For example, mosquito control requires tremendous flexibility in deciding how, when and what type of pesticide to apply since pest outbreaks and mosquito borne disease crises, by nature, are unplanned. Public health officials often have only a few hours to a day or two to respond to an outbreak. AMCA Amicus Br. 6. Likewise, farmers often must adjust pesticide applications in rapid response to unpredictable changes in weather conditions. Pet.App.155a. NPDES permitting is incompatible with the flexibility these operations need because a general permit may only govern a particular water body, geographical area, or targeted pest. In response to a sudden outbreak or change in conditions, a mosquito control agency or farmer could be forced to seek coverage under a different general permit—if one existed—or could be forced to cease operations or risk sanctions if a general permit did not cover the new conditions.

Furthermore, the administrative burdens of even general permitting may be crippling. For instance, under a general permitting regime, a farmer applying for an irrigation system aquatic weed control permit may be required to comply with significant monitoring, public notice, recordkeeping and planning requirements. Cong. Amicus Br. 17-18. The costs of monitoring alone may be prohibitive for individuals and small entities. AMCA Amicus Br. 7. This will be particularly burdensome since the states will likely

have vastly different approaches and capabilities.[6] Moreover, even after general permitting is in place, pesticide applicators will face the constant threat of litigation under the CWA's citizen suit provision. Cong. Amicus Br. 18. That will create added burdens on mosquito control agencies, small businesses, and individual farmers and likely chill activity needed to promote agriculture and protect public health.

And the potential adverse public health consequences of such a regulatory regime cannot be overstated. Mosquito-borne diseases present in the United States—including St. Louis Encephalitis, Eastern Equine Encephalitis, Western Equine Encephalitis, Dengue Fever and West Nile Virus—are prevented only by effective mosquito control. AMCA Amicus Br. 3-4. If public health agencies are deterred from fully implementing their mosquito control programs by the administrative and financial burdens of permitting and the threat of litigation, Americans will face an increased risk of exposure to such diseases.

* * * * *

This Court has recently granted certiorari in environmental cases in which the government has similarly agreed with the petitioners that the lower court's decision was wrong but argued that the decision was not sufficiently important to warrant this Court's review. *See, e.g., Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009); *Entergy Corp. v. Riverkeepers, Inc.*, 129 S. Ct. 1498 (2009). By

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[6] Even where federal permits are issued, states may require additional conditions under 33 U.S.C. §1341.

any measure, the potential adverse impact of the decision below is exponentially greater than the potential adverse impact of the lower court decisions in those prior cases in which the Court granted certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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